Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-856

In The
Supreme Court of the United States
October Term, 1985

FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Plaintiff-Petitioner,

vs.

PHILADELPHIA RESINS CORPORATION,

Defendant-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Case No. 83-1362

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KIPP AND CHRISTIAN, P.C.

D. GARY CHRISTIAN
KAREN J. MCCLURG
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111

Attorneys for the Defendant-Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTION PRESENTED

Should a Federal District Court sitting in a diversity action dismiss for lack of personal jurisdiction tort claims against a foreign corporation when that corporation's only contacts with the forum state are the failure of a product within the forum state and a miniscule number of isolated sales of different and unrelated products to buyers in the forum state?

LIST OF PARTIES

Devcon Holdings, Inc., a Delaware Corporation, is the parent company of Philadelphia Resins Corporation. Philadelphia Resins Corporation has no subsidiaries, except a wholly-owned subsidiary, or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

	Page
Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440 (10th Cir., 1985)	1, 2, 4
Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961)	3
Hanson v. Denckla, 357 U.S. 235 (1958)	2, 4
International Shoe Co. v. State of Washington, 326 U.S. 310 (1945)	2
McGee v. International Life Insurance Co., 355 U. S. 220 (1957)	3
Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952)	3
World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286 (1980)	1, 3, 4

SUMMARY OF ARGUMENT

The opinion of the Tenth Circuit in this case is entirely in accordance with the decisions of the Supreme Court of the United States regarding the application of *in personam* jurisdiction by a forum state over a foreign corporation.

———o———

ARGUMENT

The petitioner asserts that a Writ of Certiorari is appropriate in this case because the Tenth Circuit has decided an important question of federal law in a way conflicting with applicable decisions of the Supreme Court of the United States. On the contrary, the decision of the Court published at *Fidelity & Casualty Co. of New York v. Philadelphia Resins Corp.*, 766 F.2d 440 (10th Cir. 1985) does not conflict with any applicable decisions of the United States Supreme Court. The thoughtful and well-reasoned opinion by the Tenth Circuit demonstrates that the Court carefully analyzed and adhered to the previous pronouncements of the Supreme Court of the United States dealing with the issue of *in personam* jurisdiction.

The petitioner argues that the Tenth Circuit erred in determining that the State of Utah did not have personal jurisdiction over the defendant, Philadelphia Resins Corporation; the petitioner is incorrect in claiming that the result reached by the Tenth Circuit is inconsistent with the decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Tenth Circuit opinion gives a careful and detailed history of the developments and

trends affecting the doctrine of due process as it applies to *in personam* jurisdiction and its requirement of minimum contacts. The ultimate holding harmonizes with the facts found in each of the landmark decisions of the Supreme Court.

The Tenth Circuit recognized that the application of the rule of minimum contacts "will vary with the quality and nature of the defendant's activity", *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and that "[w]hether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly administration of laws which it was the purpose of the due process clause to insure." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945). The Tenth Circuit carefully reviewed and considered the contacts which Philadelphia Resins Corporation had with Utah, the forum state, prior to the accident which gave rise to this litigation:

> "The sum total then, of [Philadelphia Resins Corporation's] contacts in Utah are: (1) a miniscule number of sales of products other than 'Phillystran' cable, (2) advertising in a national trade magazine that presumably reaches Utah,[1] and (3) the failure of one of its defective 'Phillystran' cables in Utah after the cable was taken there by one of its customers." 766 F.2d at 443. (Footnote added by respondent.)

Clearly, these minimal contacts with the State of Utah are insufficient to confer personal jurisdiction over Phila-

---

[1]With respect to the advertising, the Court further noted that although the Philadelphia Resins' advertisement was seen by the purchaser of the cable in a trade publication which presumably had national circulation, the advertisement was not seen or acted upon in the State of Utah. 766 F.2d at 447.

delphia Resins Corporation for the claims made in this action.

The Tenth Circuit's dismissal of the action is entirely consistent with the decisions of the United States Supreme Court setting forth the requirements for minimum contacts which will uphold a finding of *in personam* jurisdiction over a foreign corporation. The minimal contacts with Utah by Philadelphia Resins were not related to the claims asserted by the plaintiff, as in *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Nor were Philadelphia Resins' contacts with Utah continuous and systematic, as in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the defendant's substantial contacts with the forum state were unrelated to the plaintiff's claims. Neither did Philadelphia Resins' contacts with Utah come about by reason of its placing a product into the stream of interstate commerce with the expectation that at least some of that product would be sold or used in the forum state, as established in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

The mere fact that the product somehow finds its way into the forum state does not subject the foreign manufacturer to personal jurisdiction in the forum state. If that were the case, as this Court recognized in *World-Wide Volkswagen Corp. v. Woodson, supra,* the "seller of chattels would in effect appoint the chattel his agent for service of process." 444 U.S. at 296.

The Tenth Circuit in this case correctly summarized the differences between *Gray v. American Radiator & Standard Sanitary Corp., supra,* where personal jurisdic-

tion over a foreign manufacturer was upheld, and *World-Wide Volkswagen Corp. v. Woodson, supra,* where personal jurisdiction over a foreign distributor and foreign dealer was found lacking:

> "There is a subtle distinction between cases like *Gray* and the *World-Wide Volkswagen* case that is critical to the disposition of the instant case. If a defendant's product comes into the forum state as a result of a deliberate, although perhaps indirect, effort of the defendant to serve the forum state's market, then that defendant is subject to jurisdiction there. Placing one's product into the 'stream of commerce' with the expectation of distribution into particular areas is the classic example of such an indirect effort. If, however, the defendant's product comes into the forum state as the result of the actions of an unconnected third-party or of fortuitous events over which the defendant has no control, then the defendant is not subject to jurisdiction in the forum state. The distinction in these cases is really no more than a refinement of the 'purposefully availing' test of *Hanson v. Denckla, supra.*
>
> • • •
>
> "While *in personam* jurisdiction can be based on contacts with the forum state that are either related to the cause of action or are unrelated to it, the 'minimum contacts' doctrine requires contacts in the latter case to be more substantial." 766 F.2d at 446, 447.

In the instant case, the contacts of Philadelphia Resins Corporation with the State of Utah are entirely too insubstantial to require it to defend a lawsuit commenced in Utah. Due process requires that its contacts with Utah consist of some substantial activity with some degree of continuity before a finding of *in personam* jurisdiction over Philadelphia Resins Corporation can be sustained.

CONCLUSION

In dismissing the action against Philadelphia Resins Corporation, the Tenth Circuit Court of Appeals correctly interpreted and applied the doctrines enunciated by the United States Supreme Court regarding *in personam* jurisdiction over a foreign corporation. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KIPP AND CHRISTIAN, P.C.

D. GARY CHRISTIAN
KAREN J. MCCLURG
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111

Attorneys for the Defendant-Respondent